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No. 79-1709.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

THOMAS J. ALBERNAZ AND EDWARD RODRIGUEZ,
PETITIONERS,
v.
UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Reply Brief for the Petitioners.

MARTIN G. WEINBERG,
JUDITH H. MIZNER,
OTERI & WEINBERG,
10 Post Office Square,
Boston, Massachusetts 02109.
(617) 227-3700
Attorneys for Petitioner Albernaz.

RAYMOND E. LAPORTE,
408 Madison Street,
Tampa, Florida 33602.
(813) 621-4771
Attorney for Petitioner Rodriguez.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Introduction.

The government argues that consecutive sentences are authorized where a single conspiracy with dual objectives is charged in separate counts as violative of two conspiracy provisions (G.B. 10-33).* This argument is predicated, in essence, on two assumptions — first, that if the language of two distinct statutory provisions, examined in a factual vacuum, is facially unambiguous there is no statutory ambiguity and, therefore, multiple punishment is authorized; and, second, that the *Blockburger*** test for analyzing whether two statutory offenses are the "same offense" is the presumptively determinative method for establishing Congressional intent to authorize consecutive sentences. Both of these assumptions are, as will be demonstrated below, unsound.

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*"G.B." refers to the brief for the United States.

** *Blockburger* v. *United States*, 284 U.S. 299 (1932).

I. Examination of 21 U.S.C. §§ 846 and 963 does Not Disclose Authorization to Impose Consecutive Sentences for a Single Conspiracy to Import and Distribute.

(Reply to G.B. 10-11.)

Examining the statutory provisions in a factual void, the government concludes that because they are separate, distinct provisions, and because their language is facially unambiguous, separate sentences are authorized. In stressing the uncontested, the government misconceives the nature of the inquiry and treats a threshold showing as dispositive of the ultimate issue. The question in this case is not whether the statutes are facially ambiguous, nor is it whether petitioners' conduct is proscribed by two statutes; rather, it is whether consecutive sentences may be imposed where convictions under those statutes arise from participation in a single conspiracy with multiple objectives — a question raised, rather than resolved, by the existence of both provisions. Indeed, most cases which consider whether involvement in a single criminal transaction permits the imposition of multiple punishments arise in the context of two separate statutory provisions with separate punishments. See, *e.g.*, *Whalen* v. *United States*, 445 U.S. 684 (1980); *Simpson* v. *United States*, 435 U.S. 6 (1978); *Jeffers* v. *United States*, 432 U.S. 137 (1977); *Busic* v. *United States*, U.S. , 100 S.Ct. 1747 (1980).

Nor does the facially unambiguous nature of statutory language lead to the conclusion that there is no statutory ambiguity. The challenge here is not to the meaning of the statutory language on its face; it is to the simultaneous *application* of the two statutes in a specific factual context. While there may be situations in which such application may properly result in consecutive sentences, there may be situations in which it may not. Since neither statute at issue in this case in any way addresses this issue, these statutes *are* ambiguous — an

ambiguity which must be resolved by applying appropriate techniques of statutory construction to determine Congressional intent.*

As set out in petitioners' principal brief (P.B. 24-27), the statutory ambiguity is graphically evidenced by disparate prosecutorial and judicial application of the provisions at issue here in similar factual settings. Nor, contrary to the government's assertion, does the fact that in 1977 the Department of Justice advised prosecutors to charge a conspiracy to import and distribute in separate counts negate the existence of ambiguity. Indeed, that advisory does no more than express the *Department's* view of the proper resolution of that ambiguity — a *prosecutorial* view which is neither precedent for this Court nor evidence of *legislative* intent.**

Moreover, the government has virtually ignored the evidence of ambiguity inherent in the fact that different courts considering the same issue have reached diametrically opposed conclusions. To assert, as the government does, that the refusal of some courts to permit consecutive sentences is wrong does not even address, much less refute, petitioners' argument that divergence in and of itself *demonstrates* ambiguity.

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* The same argument — that the statutory language was unambiguous — was advanced by the government in *Busic* v. *United States*, *supra*, and rejected by this Court. As the Court stated, "[p]lainly the text of the statute fails to address the issue pertinent to decision of this case — . . . . Our task here, . . . is to ascertain as best we can which approach Congress had in mind." 100 S.Ct. at 1753.

** Nor does the government's attempt (at G.B. 31-32 n.14) to explain away prosecutorial decisions to singly charge dual objective conspiracies as a mere function of pre-Act experience with the general conspiracy statute withstand scrutiny. For, contrary to the government's suggestion, prior to the 1970 Act prosecutors had at their disposal not only 18 U.S.C. § 371 but also a number of separate drug conspiracy provisions.

II. The Statutory Ambiguity Cannot be Resolved through Application of the *Blockburger* Test or any other Tool of Statutory Analysis.

(Reply to G.B. 12-33.)

In support of the conclusions drawn from its inadequate facial analysis of the statutes, the government relies primarily on the *Blockburger* test as presumptively determinative of Congressional intent. That reliance is misplaced. While the *Blockburger* test has commonly been used as a guide in determining whether two statutory violations constitute the "same offense", it is not the sole method for discerning legislative intent to impose cumulative punishment for a single criminal episode charged as violating two statutory provisions. Nor is it constitutionally, legislatively or judicially mandated as the primary, presumptively determinative method of construing federal legislation to determine Congressional intent. To the contrary, as the court below noted, it is perhaps less useful than other tools of statutory construction (A.C.P. 41a), and as Justice Rehnquist indicated in his dissenting opinion in *Whalen* v. *United States*, *supra*, 445 U.S. at 712, there are situations in which the test has nothing to do with legislative intent.

Examination of recent decisions of this Court supports petitioners' contention that the *Blockburger* test is far from the sole and determinative touchstone in determining whether multiple punishment has been legislatively authorized. Thus, in *Simpson* v. *United States*, 435 U.S. 6 (1978), the Court examined whether Congress intended to authorize consecutive sentences where a single criminal transaction resulted in convictions for armed bank robbery (18 U.S.C. § 2113(d)) and use of a firearm in the commission of a felony (18 U.S.C. § 924(c)) — convictions under two statutes which, like the ones at issue here, are two distinct, facially unambiguous provisions each with its own punishment provisions. Noting that "the *Block-*

burger test has its primary relevance in the double jeopardy context where it is a guide for determining when two separately defined crimes constitute the 'same offense' for double jeopardy purposes" (435 U.S. at 11), this Court turned to other tools of statutory construction — including legislative history and the rule of lenity — to determine the threshold question of Congressional intent; and it resolved that question — finding no intent to cumulatively punish — without relying in any way on the *Blockburger* test.

Similarly, in *Busic* v. *United States*, U.S. , 100 S.Ct. 1747, this Court did not even mention *Blockburger* in the course of construing two separate and distinct statutes with separate penalties and concluding that Congress did not intend to permit multiple punishments where both provisions were violated by a single criminal transaction.

So too, while the *Blockburger* test was discussed in *Jeffers* v. *United States*, 432 U.S. 137 (1977), in considering whether the double jeopardy clause barred successive prosecutions, when the issue was, rather, whether Congress intended to permit multiple punishments where two statutory provisions were violated in a single transaction, the Court again eschewed reliance on *Blockburger*. Concluding, through other techniques of statutory construction, that Congress did not intend to permit multiple punishment, the Court concluded that it was not necessary to even reach the *Blockburger*, lesser-included-offense issue.

Nor, contrary to the government's suggestion, can *Whalen* v. *United States*, 445 U.S. 684 (1980) be viewed as establishing *Blockburger* as presumptively determinative of legislative intent in all cases of federal statutory construction. For in *Whalen*, which involved Congressional legislation for the District of Columbia, the Court was faced with a situation in which Congress had specifically enacted a statute adopting the *Blockburger* test as the means for determining when consecu-

tive sentences could be imposed for two statutory violations arising in one criminal episode (D.C. Code § 23-112). Moreover, notwithstanding the existence of that statute, the Court did not treat the *Blockburger* test as the only tool of statutory construction; rather, before turning to that test, it examined the statutes and their legislative history to determine Congressional intent.*

Accordingly, petitioners submit that even where application of the test results in a finding of "separate offenses," *Blockburger* does not establish a presumption of Congressional intent to impose cumulative penalties, and the government's assertion to the contrary is predicated on a logically flawed inversion of a key principle enunciated by the Court.

This principle, as articulated in *Whalen* v. *United States*, *supra*, is simply that where the *Blockburger* test results in a finding that two statutory provisions do not constitute "separate offenses," then those two provisions "are construed *not* to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent." 445 U.S. at 692 (emphasis added). This principle comports, of course, with the well established canons of statutory construction that criminal statutes are to be strictly construed in favor of the accused (*United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820)), and that any ambiguity in the ambit or penalty provisions of a statute is to be resolved in favor of the accused (*Whalen* v. *United States*, *supra*, 445 U.S. at 694; *Bifulco* v. *United States*, U.S. , 100 S.Ct. 2247, 2252).

However, this presumption *against* the imposition of multiple punishments where *Blockburger* fails to establish separate

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* Although *Blockburger* was applied in *Illinois* v. *Vitale*, U.S. 100 S.Ct. 2260 (1980) and *Brown* v. *Ohio*, 432 U.S. 161 (1977), in both of these state cases it was used in the context of resolving a constitutional double jeopardy claim — not in determining Congressional intent.

statutory offenses cannot, as the government asserts, be inverted and relied on for the proposition that "where the *Blockburger* test is satisfied, it can be inferred that the statutes sanction aggregate punishments." G.B. 24.* Rather, where the test is satisfied Congress may or may not have intended cumulative punishment for a single criminal transaction — and a clear, unambiguous congressional intent to multiply penalties must be found before consecutive sentences may be imposed. Thus, where the test is satisfied, *other* tools of statutory construction such as examination of the statutory language and structure and legislative history, as well as application of principles of strict construction and lenity, must, nonetheless, be utilized to determine Congressional intent. Accordingly, the government's suggestion that the *Blockburger* results must be given overriding weight and deemed to resolve all ambiguity is misplaced. While a finding that two statutes constitute the *same* offense may *foreclose* the imposition of consecutive sentences (absent clear legislative intent to the contrary), a finding that the two statutes constitute *separate* offenses leaves *open* the question of multiple punishments.

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* It should be noted that the government's quotations from both *Ianelli* v. *United States*, 420 U.S. 770, 785-786 (1975) (G.B. 24) and *Whalen* v. *United States*, *supra*, 445 U.S. at 691-692 (G.B. 31), purportedly in support of the presumptive effect of *Blockburger* are misleading. The quotation from *Ianelli*, as used in *that* case, refers not to the *Blockburger* test but to *Wharton's Rule* — a rule which, in accordance with the principles of strict construction of criminal statutes in favor of the accused and the resolution of ambiguity against the imposition of multiple punishments, presumes that consecutive sentences are *impermissible* absent legislative intent to the contrary. And in quoting from *Whalen* the government has selectively combined phrases from two sentences to invert the *Blockburger* principle. What the Court stated in *Whalen* prior to the phrase following the government's asterisk was that "[w]here two statutory provisions proscribe the 'same offense' they are construed *not* to authorize cumulative punishment" 445 U.S. at 692 (emphasis added).

The government relies heavily on *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946), to demonstrate the viability of the application of its outcome-determinative *Blockburger* analysis to a single conspiracy charged in separate counts as violating two distinct conspiracy provisions. Indeed, the government views that case as controlling (G.B. 15). Petitioners submit, for the following four reasons, that *American Tobacco* is inapposite and in no way controlling here.

First, *American Tobacco* involved convictions under two provisions of the Sherman Antitrust Act (15 U.S.C. §1 *et seq.*) — an act which, although criminal as well as civil, is, in petitioners' view, qualitatively different from most criminal statutes. When enacted it was primarily an economic reform measure, designed to foster competition in the marketplace — "to protect trade and commerce." H.R. No. 1707, 51st Cong., 1st Sess., p. 1. See also, *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 249 (1951) ("Congress was dealing with competition which it sought to protect, and monopoly which it sought to prevent"); Areeda and Turner, Antitrust Law, An Analysis of Antitrust Principles And Their Application, v. II, ¶ 401, p. 267 (1978) ("The central thrust of the antitrust laws is preserving competition . . ."). Described as the "Magna Carta of free enterprise" (*United States* v. *Topco Assoc.*, 405 U.S. 596, 610 (1972)), it provided not only for criminal penalties, but for injunctive relief and private treble damage actions. Indeed, at the time of the *American Tobacco* decision — and until 1974 — the criminal offense was only a misdemeanor (see 26 Stat. 209 (1890)), with sanctions that pale in comparison with the civil sanctions of dissolution of business entities, compelled transfer of assets, and treble damages.

Moreover, the Sherman Act has been described by this Court in terms appropriate to a remedial measure: "As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional pro-

visions." *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 359-360 (1933). This broad construction of the Act, thus mandated by this Court, stands in stark contrast to the traditional rule of strict construction normally employed in construing criminal provisions. Indeed, as stated by Areeda and Turner, *supra*, v. II, ¶ 310(a), p. 29, the Act's "purpose and function could never have been achieved had the courts interpreted and applied the Sherman Act in the manner of a criminal statute. And the courts have not in fact done so." See also, Developments in the Law — Criminal Conspiracy, 72 Harv. L. Rev. 920, 1008 (1959), noting that application of various aspects of conspiracy law in the context of the Sherman Act appears to differ from application in other areas because of the nature of the Act.

Second, examining the structure of the two provisions of the Act involved in *American Tobacco* further illustrates the need for caution in applying that decision to this case. Section 1 of the Sherman Act declares, *inter alia*, a conspiracy in restraint of trade unlawful and makes it an offense to "engage" in such a conspiracy (15 U.S.C. § 1). Section 2 makes it an offense, *inter alia*, to monopolize or conspire to monopolize (15 U.S.C. § 2). While section 2 proscribes conspiracy in the same sense as both provisions involved in this case — the inchoate crime of agreeing to commit a substantive act — section 1 presents a different situation. Restraint of trade is not unlawful; it is the agreement in restraint of trade that is proscribed, and it is engaging in that agreement that constitutes the offense. In a sense, the conspiracy in section 1 is a substantive offense. Thus, the statutory scheme is substantively different from that involved here where both statutes proscribe conspiracy in its inchoate sense, and may provide a different rationale for consecutive sentences.*

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* Yet another interpretation of the relationship between sections 1 and 2, utilizing the descriptions of the statutory offenses set forth by the Court — a description of "one a conspiracy in restraint of trade that may stop short of monopoly, and the conspiracy to monopolize that may not be content with restraint short of monopoly" (328 U.S. at 788) — might, under current analysis, result in the conclusion that the offense described in section 1 is a lesser included offense of that described in section 2. If so, the Court's conclusion in *American Tobacco* that the offenses were separate under the *Blockburger* test was in error. See also the following footnote for further discussion of the limited precedential value, if any, of the *American Tobacco* Court's use of the *Blockburger* test.

Third, changes in the mode of analysis employed in determining the permissibility of consecutive sentences where a single transaction offends two separate statutory provisions also render *American Tobacco* inapposite. Since that time courts have focused more closely on legislative intent and subjected that intent to more searching scrutiny. Indeed, as emphasized in recent decisions of this Court, legislative intent is the primary concern. See, *e.g.*, *Whalen* v. *United States*, *supra*. Yet, *American Tobacco* did not even mention, much less examine, legislative intent to authorize cumulative penalties.*

Finally, certiorari in *American Tobacco* was granted to resolve the definition of monopoly and review convictions under section 2 of the Sherman Act. 328 U.S. at 784. Thus, the validity of the consecutive sentences imposed under sections 1 and 2 was not before the Court and the portion of the opinion so heavily emphasized by the government is clearly dicta and, therefore, not controlling. See also Justice Rutledge's concurring opinion in which he declines to express a view on the multiple punishments question because certiorari was not granted on that point. 328 U.S. at 815-816.

Finally, the government attempts to dispense with the rule of lenity by saying, first, that *Blockburger* resolves any ambiguity and, second, that the rule does not apply to federal drug laws. Both of these contentions are without merit.

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*Moreover, when placed in the context of the Court's discussion, the nature of reliance on *Blockburger* in *American Tobacco* is unclear. Petitioners there contended that unless "monopoly" was construed in a particular way, their conspiracy convictions under both sections 1 and 2 of the Act subjected them to double jeopardy. According to the Court, petitioners relied on both *Blockburger* and *Braverman* v. *United States*, 317 U.S. 49 (1942), to support their double jeopardy contention. It was in the context of rejecting that contention that the Court applied *Blockburger* and found that the offenses were not "the same." Thus, contrary to the government's assertion, *American Tobacco* does not support application of the *Blockburger* test to discern Congressional intent.

First, as discussed above, *Blockburger* is not determinative of Congressional intent. Moreover, as fully discussed in petitioners' principal brief, when other tools of statutory analysis — including examination of the language of the statutory provision, the statutory structure, and the legislative history — are applied, Congressional intent with respect to whether or not to impose multiple punishments in a given factual situation remains ambiguous.*

The government seeks to reinforce its *Blockburger/American Tobacco* analysis by arguing that 21 U.S.C. §§ 846 and 963 are directed at "separate evils" and that, therefore, separate penalties are justified (G.B. 16). But this argument cannot withstand scrutiny. The "evil" at which both statutes are directed is conspiracy — not the substantive offenses which are punished elsewhere — and the essence of the crime of conspiracy is agreement. As this Court reiterated in *Ianelli* v. *United States*, 420 U.S. 770, 779 (1975), "'The basic rationale of the law of conspiracy is that a conspiracy may be an evil in itself, independently of any other evil it seeks to accomplish.'"

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* The government concedes that the legislative history is silent on the question of consecutive sentences where a single conspiracy to import and distribute drugs is concerned. Nonetheless the government argues that Congress must have legislated with the *Blockburger* doctrine in mind. There is, however, no evidence to support this speculation. Moreover, even if *Blockburger* had been in the Congressional mind, that test, as discussed above, leaves *open* the question of whether Congress intends multiple punishments for "separate offenses" arising from a single criminal transaction.

The government further argues that because Congress was aware of the existence of the separate conspiracy provisions, Congress intended that they act cumulatively where a single conspiracy violative of both provisions is involved. However, awareness of the existence of two separate provisions which have a raison d'etre distinct from that of an intent to impose multiple punishments (see petitioners' principal brief), does not give rise to a conclusion of intent to cumulatively punish.

Moreover, an examination of the structure of the Act reveals the fallacy in the government's position. 21 U.S.C. § 801 classifies importation, manufacture, distribution, possession and improper use as equally detrimental. Nowhere in the Act is there any indication that importation is viewed as more heinous than manufacture or any of the other proscribed acts. Yet, if each is a separate evil, then, under the government's analysis, conspiracy to do *any* two of these proscribed acts should result in the permissible imposition of separate and cumulative punishments. However, a conspiracy to *manufacture* and distribute violates only *one* statutory provision — § 846 — and only a single punishment could be imposed. Since manufacture and importation are functionally equivalent *vis a vis* distribution — both being acts which result in placing a substance into a position from which it can be distributed — Congress could not rationally have intended to treat a conspiracy to manufacture and distribute as a single evil subject to only one punishment while treating a conspiracy to import and distribute as separate evils subject to double punishment.*

Second, the government's assertion that the rule of lenity is inapplicable to drug laws must also be deemed unavailing. As this Court stated in *Bifulco* v. *United States*, U.S. , 100 S.Ct. 2247, 2252 (1980), in construing this same Act, "this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." Nor was the Court's application of the rule of lenity in *Bifulco* as grudging as the government appears to suggest. Although resting its decision initially on a finding that Congress likely chose not to impose a

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* For example, the social danger created by distribution of amphetamines is no greater when preceded by importation than when preceded by manufacture in this country.

special parole term for a conspiracy conviction, the Court continued, stating that in any event, there was an *absence* of evidence of an unambiguous decision to authorize such terms and "*of course*, to the extent that doubts remain, they must be resolved in accord with the rule of lenity." 100 S.Ct. at 2259 (emphasis added). The Court further emphasized the applicability of the rule of lenity by stating:

> That it would be extremely difficult to accept the Government's argument that Congress *unambiguously intended* a contrary result, however, perhaps is best evidenced by the fact that the rule of lenity is not mentioned, let alone applied, in any of the lower court opinions that have accepted the Government's position.

100 S.Ct. at 2259, n.17 (emphasis in original). In so stating, petitioners submit, the Court unambiguously recognized that drug laws lie squarely within the ambit of the lenity rule. Applying that rule to the ambiguity here, it must be concluded that the consecutive sentences imposed in this case are impermissible.

Conclusion.

For all the aforementioned reasons, and the reasons set forth in petitioners' principal brief, the decision below must be vacated and the case remanded for resentencing.

Respectfully submitted,

MARTIN G. WEINBERG,
JUDITH H. MIZNER,
OTERI & WEINBERG,
10 Post Office Square,
Boston, Massachusetts 02109.
Attorneys for
Petitioner Albernaz.

RAYMOND E. LAPORTE,
408 Madison Street,
Tampa, Florida 33602.
Attorney for
Petitioner Rodriguez.